

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD  
OF THE STATE OF DELAWARE**

**IN THE MATTER OF:  
RICHARD D. SMITH,**

**Grievant,**

**v.**

**STATE OF DELAWARE  
DEPARTMENT OF TRANSPORTATION,**

**Agency.**

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) **DOCKET NO. 05-04-327**  
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)  
) **ORDER**  
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**COPY**

**BEFORE** Brenda C. Phillips, Chairperson, and Board members, John F. Schmutz, Esquire, and Joseph D. Dillon constituting a quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* §5908(a).

**APPEARANCES:**

For the Grievant:

Perry F. Goldlust, Esquire  
Aber, Goldlust, Baker & Over  
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For the Agency:

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Deputy Attorney General  
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**PROCEDURAL HISTORY**

This is a timely filed appeal from a Step 3 decision, docket number 05-04-327. The Step 3 decision denied the grievance of Richard D. Smith ("the Appellant") finding that the Appellant failed to demonstrate a violation of Merit Rule 18.5 with regard to the decision of the Department of Transportation ("DelDOT") not to promote him to the position of Equipment Operator IV.

This is the Decision and Order of the Board after consideration of the testimony and exhibits at the evidentiary hearing which, for the reasons stated below, finds for the Agency and denies the appeal.

### **RELEVANT MERIT RULE**

**MERIT RULE NO. 18.5** Grievances about promotions are permitted only where it is asserted that (1) the person who has been promoted does not meet the minimum qualifications; (2) there has been a violation of Merit Rule 2.1 or any of the procedural requirements of the Merit Rules; or (3) there has been a gross abuse of discretion in the promotion.

### **SUMMARY OF THE EVIDENCE**

**Richard D. Smith** was sworn and testified that he has worked for DelDOT for 23 years in Area 20. He was originally hired as an Equipment Operator and progressed through the career ladder to an Equipment Operator III. Mr. Smith described for the Board his duties and the various pieces of equipment used as an equipment operator in Area 20. Mr. Smith explained the differences in his duties and the duties of the equipment operators in Area 4 which is located behind Area 20.

Mr. Smith testified that one of the pieces of equipment that is required for an Equipment Operator IV is the stone spreader. Mr. Smith was certified on the older model of spreader as an Equipment Operator III but was advised that he would be grandfathered in when it was upgraded to a level IV piece of equipment. The newer stone spreader is computerized and requires three people to operate it to get the trucks up and down to dump the stone. Mr. Smith stated that he ran the new spreader for a whole summer but when he put in for the Equipment Operator IV the following summer he did not get the

position. Mr. Smith testified that at times he also functioned as a crew leader off and on and was the crew leader on the tar chipper for 3 years.

Referring to Appellant's Exhibit 1 (a), Mr. Smith reviewed for the Board the various pieces of series equipment identified on the Employee Certification Profiles for seven of the equipment operators in Area 20 who are currently Equipment Operators IV.<sup>1</sup> The equipment is identified by the series in which it falls for purposes of certification. For example, 101 is in series 100, 202 is in series 200, 301 is in series 300 and 404 is in series 400. All of the identified operators operate the same basic series 400 equipment used in Area 20.

As reflected in Appellant's Exhibit III, Mr. Smith was determined to have the requisite number of series IV pieces of equipment to meet the minimum qualifications to put in his bid for the Operator IV position. Mr. Smith testified that he was advised by letter that he had not been selected for the position and that Josh Robbins had been selected. Mr. Smith subsequently reapplied for the position of Equipment Operator IV when Mr. Robbins left but was advised that he did not make the certification list. He was offered a position in Area 4 during settlement negotiations but did not want to leave Area 20.

On cross-examination, Mr. Smith agreed that moving to Area 4 would limit the freedom he has in Area 20 where he is on a float crew that moves around the county. He agreed there are some benefits that he has working in Area 20 that he would not have in Area 4 but he stated that he also has never run most of the equipment used in Area 4. Mr. Smith stated that he is on the certification team but he believed that the last time he actually tried to certify on a piece of equipment was in 2002. Mr. Smith agreed that he

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<sup>1</sup> One individual is shown as an Equipment Operator III but has since become an Operator IV.

was not challenging Mr. Robbins' certifications that qualified him for the Operator IV position.

On examination by the Board, Mr. Smith clarified that the complexity of the equipment increases as an operator moves from an Operator I to an Operator IV. In order to move to an Operator IV, the operator must qualify on at least four pieces of equipment in the IV category; qualifying on the equipment alone does not move the person to an Operator IV. He agreed that there are a limited number of Operator IV positions. An Operator IV is like a supervisor and the operator has to put an application in for the position.

On further direct examination, Mr. Smith agreed that he did not think he had an automatic right to the position. He understood that there was an interview and a qualification process. His objection was that someone from Area 4 got the job despite the fact that he was already working and experienced with the equipment and duties in Area 20 including running the new stone spreader.

**Joseph Wright** was sworn and testified that he is employed by DelDOT as an engineer in the South District. He has worked for Del DOT for 26-1/2 years and has held his current assignment for the last 4-1/2 years. He has held management positions for at least 20 years and has been involved in filling dozens of positions. He is familiar with the Merit Rules and DelDOT's promotional processes.

Mr. Wright identified State's Exhibit 1 as the posting for the Operator IV position in contention. Mr. Wright explained the two means by which an individual could qualify for the position using four 400 series equipment pieces or two 400 series pieces, plus three additional pieces which can be a combination of 300 and 400 series pieces. The first

method of promotion also requires experience as a project leader who self manages. Under method number two experience as a crew leader is specified. Equipment may be used only once in pursuit of promotion. For example, if a piece of equipment was used to promote to an equipment operator III it could not be then be used to promote to an Operator IV.

Mr. Wright testified that he was on the panel that interviewed Mr. Smith and Mr. Robbins for the position of Operator IV. The other members were Jeffrey, maintenance engineer; Mike Henry, maintenance superintendent; John Burton, the Area 20 supervisor at the time of the interview; and Darlene Houseman, the human resources (HR) representative. Mr. Wright explained that Mr. Smith and Mr. Robbins were the two candidates interviewed for the position. They were asked a series of prepared questions that were pre-approved by the HR Division in accordance with standard procedure. At the conclusion of the interviews, they each stated who they thought was the better candidate and the vote was five to zero in favor of Mr. Robbins.

From Mr. Wright's perspective, Mr. Robbins was the better candidate because he was qualified on more pieces of equipment than Mr. Smith and provided better responses to the questions he was asked during the interview. He stated that Mr. Smith's responses to be very short and did not necessarily respond to the questions asked. For example, when asked about the traits a crew leader should have, Mr. Smith responded with examples of responsibilities rather than traits.

After he got the position, Mr. Robbins applied for a lateral transfer to another area within DelDOT in the Central District and was selected for the position. Under the union

contract he was able to do so and there was nothing they could do to stop the transfer although they were sorry to see him go.

Mr. Wright explained the renumbering of the pieces of equipment in the certification manual, the effect of inactive pieces on promotion and the grandfathering of individuals with regard to certain pieces of equipment pursuant to an agreement with the union. Mr. Smith made the certification list the first time after the certification manual was re-written. It was unclear whether he actually had enough pieces to qualify but since HR put him on the certification list, he was interviewed as meeting the minimum qualifications. Mr. Wright stated when the position was posted again due to the vacancy, HR determined that Mr. Smith did not meet the minimum qualifications for an Operator IV and should not have made the certification list for the position in question.

Mr. Wright stated that he was the ultimate decision maker for the position but he would almost certainly honor the decision made by the vote of the panel members even more so in a five to zero vote.

On cross-examination, Mr. Wright reviewed the information on Appellant's Exhibit 3 with regard to Mr. Smith's certifications on various pieces of equipment.<sup>2</sup> He explained that the initial decision about whether someone meets the minimum qualifications is made by HR. Mr. Smith was qualified on the spreader in 1998. Even though a newer piece of equipment replaced the older model, Mr. Smith retained his certification on it and was not required to re-test. He distinguished that being qualified to run the machine and requiring training to work it are two different things. His

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<sup>2</sup> Mr. Wright answered a number of questions related to specific pieces of equipment operated by Mr. Smith. The parties stipulated that Mr. Smith was placed on the certification list by HR; therefore, the specific testimony regarding each individual piece of equipment is not summarized herein.

certification did not change under the grandfathering provision; however, he would require some additional training.

Mr. Wright testified that the panel considered not only the results of the interview but the qualifications of the individuals, including the pieces of equipment they used and the nature of the work they performed. They also considered work history and seniority. Mr. Wright stated that Area 4 and Area 20 do some of the same jobs but there are certain things that only Area 20 does such as tar and chip which is a season long activity. He agreed that someone in Area 4 who is primarily responsible for mowing, plowing and other assignments like drainage, trash and dead animal detail would not get the opportunity to work on a chipper spreader.

Mr. Wright testified that he had some professional interaction with both Mr. Robbins and Mr. Smith. He has seen Mr. Robbins work. His interaction with Mr. Smith was more related to his union activities. He described their relationship as good, professional. He agreed that grievances are sometimes adversarial but it is not personal.

Mr. Wright stated that in order for Mr. Smith to be promoted to an Operator IV he would need to meet the minimum requirements of having sufficient pieces of equipment and then be selected as the best candidate after the interview process. He would need to answer questions more fully, completely and correctly. His success would depend upon the other candidates with whom he is competing at that point.

Mr. Wright testified that there were no significant deficiencies in Mr. Smith's work performance at the time of the interview and to his best recollection his performance evaluation indicated that he satisfactorily met the requirements of his job. Mr. Wright stated that the questions asked during the interview were very relevant to the

job of the Equipment Operator IV and dealt with equipment certification, issues involving being a crew leader, and some technical questions along the lines of drainage. There were a variety of things to allow for comparison between candidates. He stated that he was not saying that Mr. Smith did not know the pieces of equipment he was certified on. Mr. Robbins was certified on more pieces required for the Operator IV. He believed Mr. Robbins' qualifications were superior to Mr. Smith's. Mr. Wright agreed that Mr. Smith had more experience in Area 20 and more seniority than Mr. Robbins. Seniority is one of the items but not the primary item. If the candidates were considered equal it might be a determining factor. Everyone agreed that the interview by Mr. Smith was very poor.

On re-direct examination, Mr. Wright explained that employees are offered the opportunity to obtain additional certifications by requesting and testing on a piece of equipment. The training is usually during normal working hours. If it occurred after hours the employee would be paid. Mr. Smith has the opportunity to train to meet the current standard for Equipment Operator IV; in fact, his seniority would give him some preference toward training under the union contract.

On examination by the Board, Mr. Wright clarified that no one particular piece of equipment is required to be an Operator IV; there are many pieces of equipment that an individual can use to meet the minimum. The primary factor in the selection was the interview coupled with Mr. Robbins qualifications. Mr. Smith and Mr. Robbins both met the minimum qualifications but Mr. Robbins exceeded the minimum by virtue and having more pieces of equipment. Although he had only a few years with DelDOT, he had been aggressively training and certifying on pieces of equipment with at future to continue to



train and qualify on more pieces. Mr. Smith had not certified on a piece of equipment since 2002.

Although Mr. Smith was put on the certification list for the position in dispute, a later more detailed review by HR resulted in his not making the list when a subsequent vacancy arose. HR essentially made a mistake in putting him on the list the first time in the way they counted the pieces of equipment. However, Mr. Wright and the rest of the hearing panel, assumed when they interviewed Mr. Smith that HR had been correct and that Mr. Smith was qualified as far as the required number of pieces. The panel determined that Mr. Robbins rated higher as far as the equipment; both candidates were about the same as far as past work history; and Mr. Smith had more seniority but Mr. Robbins out performed him on the interview.

### **FINDINGS AND DISCUSSION**

The exhibits introduced into evidence were made part of the record and considered by the Board in making its decision. The Board heard sworn testimony from Appellant Richard D. Smith and Joseph Wright.<sup>3</sup>

Merit Rule 18.5 only permits a grievance with regard to a promotion under very limited circumstances:

**MERIT RULE NO. 18.5** Grievances about promotions are permitted only where it is asserted that (1) the person who has been promoted does not meet the minimum qualifications; (2) there has been a violation of Merit Rule 2.1 or any of the procedural requirements of the Merit Rules; or (3) there has been a gross abuse of discretion in the promotion.

Mr. Smith acknowledged that the successful candidate, Mr. Robbins, met the

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<sup>3</sup> The parties proffered that the remaining interview panel members would testify consistent with the testimony of Mr. Wright as to their bases for selecting Mr. Robbins as the successful candidate over Mr. Smith. The parties stipulated that the other panel members did not need to be called.

minimum qualifications for the position of Equipment Operator IV and therefore Merit Rule 18.5 (1) does not provide a basis for his appeal. There was no assertion that Merit Rule 18.5 (2) was applicable. The only basis, therefore, upon which Mr. Smith can base his appeal, is Merit Rule 18.5 (3) by alleging a gross abuse of discretion. Mr. Smith alleged that the gross abuse of discretion was based upon the Agency's failure to consider his past work history and familiarity with equipment used in Area 20 --- the area in which the Equipment Operator IV position was located. Mr. Smith alleges that it was a gross abuse of discretion to select someone from outside of Area 20 for the position because he was the most qualified candidate.

Gross abuse of discretion is a high standard akin to a reckless indifference or is found where there is an extreme departure from the ordinary care normally given to a situation. In this situation, Mr. Smith was determined to have met the minimum qualifications and interviewed for the position.<sup>4</sup> Mr. Wright testified that the candidates were asked the same list of questions during the interview. The panel unanimously concluded that the successful candidate performed better in the interview and was more thorough and responsive to the questions asked of him. Although Mr. Smith had more years of experience working in Area 20 and more experience with some of the equipment routinely used in that area, the unrebutted testimony of Mr. Wright was that the successful candidate exceeded the minimum qualifications by having obtained certification on more pieces of equipment which the panel factored into the promotional decision. Mr. Wright testified that Mr. Smith's experience was considered but it was

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<sup>4</sup> Although testimony was offered that it was later determined in regard to a subsequent application that Mr. Smith did not actually meet the minimum qualifications at the time he applied for the position in dispute--- that is not the basis of the decision in this appeal. In addition, the interviewing panel members accepted for purposes of the interview and consideration for the position that he did in fact meet the minimum qualifications based on the determination made by DelDot's human resources department.

outweighed by the successful candidate's aggressiveness in seeking certification on additional pieces of equipment relevant to the position of Equipment Operator IV and his superior interview. The posting for the position (State's Exhibit 4) stressed that the position required someone who could communicate and be a good project and crew leader. Mr. Wright testified that the successful candidate was a better communicator and was more responsive to the questions.

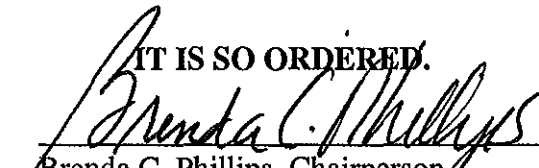
The Merit Rules recognize the discretionary nature of promotional decisions by setting the standard for proving a violation at the level of gross abuse of discretion. The Board's determination is not whether it would have made the same decision but whether the Agency committed a gross abuse of discretion in the promotional decision. In this case the Board finds that the evidence established that the Agency considered the factors required under Merit Rule 10.4 by considering the candidates' qualifications, performance record, seniority, conduct and interview.

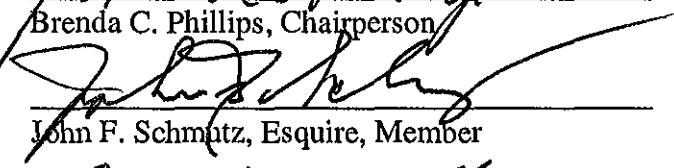
The Board, therefore, finds that the Appellant has failed to sustain his burden in this matter of demonstrating that the employer's decision not to promote him to the position of Equipment Operator IV constituted a gross abuse of discretion in violation of Merit Rule 18.5 (3).

**ORDER**

For the foregoing reasons, the grievance appeal of Richard D. Smith is **DENIED**.

**IT IS SO ORDERED.**

  
Brenda C. Phillips, Chairperson

  
John F. Schmutz, Esquire, Member

  
Joseph D. Dillon, Member

### APPEAL RIGHTS

29 Del. C. §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 Del. C. § 10142 provides:

(a) Any party against whom a case decision has been decided may appeal such decision to the Court.

(b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.

(c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

April 3, 2007  
Mailing Date: JB

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Board Counsel

Deputy Attorney General

Counsel for Appellant